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No. 92-1461

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

PETROLITE CORPORATION,

Petitioner,

vs.

RICHARD L. GODAR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should impose a more onerous standard of willfulness on an ADEA plaintiff because the defendant has treated the plaintiff discriminatorily than It imposes when the defendant has only adopted a policy or rule which has a disparate impact?

2. Whether a finding of willfulness was reversible error when:

   A. the jury instructions defined willful as defined in *Trans World Airlines v. Thurston,* 469 U.S. 111 (1985), and;

   B. there was direct evidence of age animus in the statements of two (2) corporate vice presidents who played central roles in the discharge, and;

   C. the defendant actively caused or knowingly cultivated the very problems used as pretext, and;

   D. a short sequence of events culminated in an alleged reduction in force which did not decrease the number of personnel in plaintiff's group but did replace plaintiff with a young chemist, and;

   E. the defendant gave a purely nominal role in the discharge to a group of individuals whom it called the decision makers, and;

   F. the defendant attempted to humiliate plaintiff into retiring just weeks prior to discharge, and;

   G. the defendant was legally sophisticated and knew the provisions of the ADEA?

3. Whether an ADEA plaintiff who is in a job market where only two (2) comparable positions have become available in a three (3) year period, who has made efforts reasonably calculated to obtain these positions and has continued to employ a headhunter and interview for positions while also acquiring and running a small business; should be required to pay himself a salary from a business which is losing money, or have the inventory which he has purchased by acquiring debt and selling his previously owned assets, treated as earnings by ignoring the debit and liability side of his operations?

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APPENDIX

Appendix A — Joint Stipulation of the United States District Court, Eastern District of Missouri, Eastern Division 1a

No. 92-1461

In The

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October Term, 1992

PETROLITE CORPORATION,

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vs.

RICHARD L. GODAR,

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTE INVOLVED

(SUPPLEMENTAL)

29 U.S.C. § 626(c)(1)(2):

> (c) Civil actions; persons aggrieved; jurisdiction judicial relief; termination of individual action upon commencement of action by Commission; jury trial

> (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter; *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the rights of such employee under this chapter.
>
> (2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

STATEMENT OF THE CASE

Petitioner's statement of the case requires supplementation as it omits significant material and assumes as given many of it's own contentions which were clearly the central disputed issues in litigation.

The case arose from the termination of respondent Richard Godar in August of 1985. Respondent was terminated from his position as a chemist in the Fuel Additives Group, in the Research and Development Division (referred to as a "group" in the stipulations), as the culmination of an unusual sequence of events. The sequence is only briefly summarized by the Eighth Circuit panel (A-9, 10).

The company has misstated the evidence when it indicated that there was no direct evidence of willfulness or discrimination (Pet. at 5, 13, 15). To the contrary, the Eighth Circuit noted in it's opinion:

> It was open to the jury to find "wilfulness" [sic] under the statute on the basis of the evidence discussed above coupled with other evidence showing the awareness of the defendant of the provisions of the ADEA, the manner in which the discharge was effected, the sequence of events, *plus the direct evidence of age animus, to wit, Dr. Manges statement that the plaintiff was too old to get into Marketing and, in the unusual context here, the statement of Dr. Tonkyn concerning "early retirement,"* keeping in mind that Dr. Tonkyn determined who would rank the Heinzelman Section, that he was in charge of the Section and conducted the meeting of the section heads.

(A-9, emphasis added).

Without any supporting discussion, petitioner inexplicably asserts that there was no direct evidence of willfulness. This seems incomprehensible in light of the explicit language of the Eighth Circuit. Respondent can only anticipate that petitioner will in a reply brief assert that the above referenced Drs. Mange and Tonkyn were not the decision makers. The Eighth Circuit has already heard and discussed this contention (A-8, 9). Even viewed in the light most favorable to the company, Dr. Mange had by far a greater impact on the selection of respondent than any of the other members of the group to which the company seeks to attribute the decision. The discharge followed inevitably from the rankings

which Dr. Mange performed. The fact that Dr. Mange did the ranking of the respondent and participated as the acting section head of the targeted section was never in dispute.

The company has described this as a "reduction in force" case without further discussion when the issue clearly was a primary point of contention at trial and on appeal. Counsel for the company has inaccurately suggested that a stipulation was made that there was a reduction in force and the respondent's discharge was part of said alleged reduction (Pet. at 4). As the Eighth Circuit noted in it's opinion there was a stipulation that, in the months of July and August, certain named individuals were terminated from a division (other than the one in which respondent was employed) (A-2). There was no stipulation that this event in a different division was a reduction in force, that the terminations were due to a reduction in force or even that the named individuals were not being replaced or that the division ultimately ended up with fewer employees. It is clear from other discussions in the Eighth Circuit's opinion that it did not consider there to have been any stipulation as asserted by the company (A-6-10). The specific stipulation is reproduced as respondent's appendix (1a).

It is highly inaccurate for petitioner to refer to this case as a reduction in force case as though this assertion was uncontroverted. The uncontroverted evidence showed that the total number of individuals in the Fuel Additives Group, where respondent was employed, was four (4) at the beginning of the sequence of events in late April, 1985 and was four (4) at end of the sequence on August 12, 1985. In addition Dr. Tonkyn, the head of the Division, issued a memo authorizing yet another new hire the day after respondent's discharge. The case was consistently argued as one of replacement disguised as reduction in force throughout trial.

Petitioner raised on appeal the question of whether or not the

evidence supported a finding of willfulness (A-5). A three (3) judge panel unanimously believed the evidence did and affirmed in an unpublished opinion (A-1, 14). The evidence in the case was very rich in detail and much attention had been focused on demonstrating that the proffered reasons given by petitioner company had been insincere and manipulated (A-7-10). The Eighth Circuit's summary is, in fact, relatively skeletal:

Beginning ten (10) months before discharge petitioner began actively generating episodes where it initiated some problem and then wrote Mr. Godar up for the problem. Personal hostility within Mr. Godar's group was cultivated by Dr. Mange and Dr. Tonkyn when both vice presidents inexplicably failed to correct the impression of a Mr. Cunningham, who inaccurately believed that Mr. Godar had been opposing his promotion. Mr. Godar had been unsuccessfully urging a promotion for Mr. Cunningham to these two (2) corporate officers. Mr. Cunningham had met with both officers and discussed the problem. Instead of correcting the misunderstanding, Dr.'s Tonkyn and Mange remained silent and used Mr. Cunningham's unhappiness as a stated reason for respondent's demotion and discharge.

In late winter/early spring of 1985 the company authorized respondent, who was then the leader of the Fuel Additives Group, to hire a chemist due to the acknowledged manpower shortage in the group. Respondent selected a man in his mid-forties. Within a few weeks he was instructed by Dr. Mange to discharge this middle-aged man although there was no job performance problem. With the assistance of Drs. Mange and Tonkyn a young chemist age twenty-six (26) was then hired into Mr. Godar's group instead. Approximately ninety (90) days later Mr. Godar was demoted and encouraged to retire.

Within days of Mr. Godar's refusal to retire, Dr. Tonkyn called a meeting of the section heads allegedly to effect a forced ranking

to effect an alleged reduction in force of two (2) from Research and Development. Mr. Godar's section was specifically targeted for both discharges according to the participants' own testimony.

Mr. Godar was the only person ranked according to factors which were admittedly no longer relevant to his then position. Mr. Godar was not ranked by his own section head, rather Dr. Tonkyn had assigned Dr. Mange the task. Dr. Mange ranked Mr. Godar and the others in the section in such a way that Mr. Godar could not possibly avoid being one (1) of two (2) discharges earmarked to come from the section. Mr. Godar's name was the first placed on the blackboard at the section head's meeting. The next day after the alleged reduction Dr. Tonkyn authorized a new hire for the division.

The case was consistently argued to the jury as involving premeditation and goal oriented manipulation rather than reckless disregard.

The company also has provided a very incomplete picture in it's discussion of the mitigation issues. The Eighth Circuit has only briefly discussed these issues in Section III of it's opinion (A-12).

The company produced no evidence of any comparable position which its own out placement service had located. Only two (2) comparable positions were identified in a three (3) year period although petitioner did try to assert that a number of positions, at a much lower pay and generally in fields unrelated to respondent's expertise, were comparable. There was only one potential employer in the geographical area and respondent had certainly made his availability known to that employer. When this one employer did have a comparable position open the employer actively recruited through a headhunter an individual who had made absolutely no efforts to obtain the position. Methods such as headhunters were the customary means by which comparable

positions were actually filled and respondent engaged in such methods including employment of his own headhunter. Formal applications were generally submitted after being hired, not before.

The company's discussion in regard to the respondent's coin shop operation inappropriately omits half of the financial picture. After months of searching for a comparable position, respondent purchased an ongoing business, *i.e.* a coin shop, but the purchase did not include any significant inventory.

Respondent mortgaged his home to provide funds to run the business and to purchase inventory. Respondent borrowed substantial sums commercially and from his sister for the same purposes. In addition he eventually sold his home and some recreational real estate for the same purposes. The increase in inventory went hand in hand with a corresponding increase in liability and loss of other assets.

Petitioner also describes this situation as one where respondent "elected" not to pay himself a salary. The evidence did not show any profits in the business during the backpay period. The full amount of profits (per petitioner's accountants) during the interim or front pay period were duly deducted from that award.

REASONS FOR DENYING THE WRIT

Under any of the standards proposed for judicial review of jury finding of willfulness, the evidence in the present case would be sufficient. Petitioner's conduct involved much that was odious, was highly systematized, and involved much manipulation to insure that a young chemist would replace respondent. The proffered reasons for discharge were such that they could not logically be seen as both pretext and a sincere factor in the motivation for discharge.

The opinion below does not conflict with *Thurston*. *Thurston* did not add any additional elements to the ADEA, but reviewed the willfullness finding more carefully than a liability finding. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Nothing in *Thurston* indicated an additional tier should be added to the statute to favor a defendant precisely because the evidence shows that the defendant had treated the plaintiff adversely due to plaintiff's age. On the contrary, *Thurston's* reasoning would logically require that, to the extent we have selected a subcategory of violations based on criteria indicative of willfulness, the subcategory would necessarily have a proportionally higher rate of liquidated damages awards. If that were not the case we would have to question if the two-tiered system were working correctly. The opinion below follows *Thurston* in language and reasoning.

Petitioner's suggestion that the Eighth Circuit's opinion is in conflict with the progeny of *Thurston* is premised on the inaccurate assertion that there was no direct evidence to support the willfulness finding.

Petitioner's suggestion that a significant issue is presented in the mitigation issues is also premised on an inaccuracy. Petitioner can only frame a sensible argument on this issue by ignoring the rarity of available comparable jobs, the limited profits in the respondent's small shop, and the debit and liability side of his operations.

I.

A. THE RESULT REACHED IN THE PRESENT CASE WOULD NOT LIKELY BE CHANGED BY A RESOLUTION OF THE CONFLICTS CITED BY PETITIONER.

The most significant conflict in the opinions cited by petitioner is between those which review on a case by case basis

with a higher degree of scrutiny and those which adopt a specific test or formula as an additional element to the statute.

The former cases may employ various verbal formulae but use such as tools of judicial analysis rather than added elements. *Cf. Lindsay v. American Case Iron Pipe Co.*, 810 F.2d 1094, 1100 (11th Cir. 1987); *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989), *cert. denied*, 493 U.S. 842 (1989); *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) also falls in this category. *Thurston* did not add any additional requirement to the statute, but engaged in a careful scrutiny of the evidence to determine if it supported liquidated damages. *Id.* at 129. *Dreyer v. ARCO Chemical Co.*, substantially relied on by petitioner, is also such a case and indicated that no litany of circumstances could be recited which would inclusively describe all the instances when it's "outrageous conduct" principle would be present. *Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 658 (3rd Cir. 1986), *cert. denied*, 480 U.S. 906 (1987). Dreyer clearly used the word "outrageous" as a term of art and indicated review of a willfulness finding should be based on an "ad hoc" enquiry into the circumstances of each case. *Id.* Systematic purging of older employees would, for example, be a form of outrageous conduct. *Id.*

Those opinions which formally adopt a precise formula or test add elements or procedural requirements which would be peculiar to disparate treatment cases. Such opinions will typically require additional jury instructions or instructions differing from *Thurston*. *Cf. Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1166 (6th Cir. 1991); *Schrand v. Pacific Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988). Alternatively a requirement that respondent produce direct evidence of the opponent's state of mind has been advanced. *Hudson v. Normandy School District*, 953 F.2d

410 (8th Cir. 1992). All of the latter class of opinions impose some additional element or requirement on those ADEA respondents who have been found to be victims of specifically directed discrimination because this subcategory of violations inherently suggests willful conduct and often results in such a finding.

Petitioner company raised on appeal the question of whether the evidence supported a finding of willfulness. Respondent suggests that the evidence meets any and all of the standards proposed by petitioner. The present case involved not only direct evidence of age animus, but much of petitioner's conduct was odious, systematic, and contrived to whitewash an age based discharge. The manipulative nature of petitioner's proffered reasons for discharge are such that, if rejected by the jury, they could not reasonably be also seen as sincere factors in the discharge. The nature of the pretext is such that it shows willfulness and not a lack thereof.

Mr. Cunningham's situation offers an excellent example. There was an abject failure by Drs. Mange and Tonkyn to treat this problem as one of sincere concern to themselves or the company. Subsequently this problem was offered as a basis for the discharge although it was admitted to no longer be relevant to respondent's job at the time of discharge. It would be logically impossible to see this alleged "dissension" within Mr. Godar's group as both pretext and also as, to any extent, a sincere factor in the motivation for discharge given the particular facts of this case.

B. THE PRESENT CASE PRESENTS NO CONFLICT WITH *THURSTON* AND PETITIONER'S ARGUMENT IS PREMISED ON THE MISSTATEMENT THAT THE PRESENT CASE INVOLVED NO DIRECT EVIDENCE OF WILLFULNESS.

Respondent finds it difficult to see how the opinion below can be said to conflict with *Thurston* when the instruction used was the

one approved in *Thurston*. *Thurston, supra.* at 126.

Thurston has been concerned with the application of this definition in a case involving disparate impact and the use of a "in the picture" standard. *Id.* at 127-128. *Thurston* clearly envisioned a two-tiered system in regard the overall category of all ADEA cases. However, we are now considering only a subcategory of violations which have been selected specifically for the presence of factors indicating that the violation was willful. One would expect a large percentage of the violations so selected to involve conduct which was willful in fact. There is nothing in *Thurston* to indicate that varying two-tiered schemes be applied to different subcategories to effect some uniform rate of success in each category. *Thurston's* reasoning would logically require that, to the extent we have selected a subcategory of violations based on criteria indicative of willfulness, the subcategory would necessarily have a proportionally higher rate of liquidated damages awards. If that were *not* the case we would have to question if the two-tiered system were working correctly.

To read *Thurston* as does petitioner would effectively reward intentional violations precisely because the evidence adduced at trial would necessarily show, to some degree, that the violation was willful. The presence of factors demonstrating willfulness would by definition trigger a higher standard or definition of willfulness. This would be inconsistent with *Thurston's* view that Congress intended to deter and not encourage willful violations. *Id.* at 125.

Petitioner also argues that the opinion below is in conflict with *Thurston's* progeny because there was not direct evidence of willfulness. This is clearly incorrect as the Eighth Circuit specifically noted the presence of direct evidence of age animus (A-9).

Although not initially presented by petitioner, respondent must anticipate that petitioner will respond with an argument that the direct evidence referred to by the Eighth Circuit were not statements made by the decision makers. Even viewed in the light most favorable to petitioner's contention, Dr. Mange was the most influential of the alleged participants. It was established from the company's own witnesses that Dr. Mange ranked the individuals from the section in which Mr. Godar was employed, that this same section was the one targeted for the only discharges which were to occur, and that the discharges followed Dr. Mange's ranking. None of section heads were allowed as much effective input and the circumstances created by Dr. Tonkyn clearly dissuaded them from any disagreement.

In the light most favorable to respondent the section heads played no real part in the decision but were only a cosmetic applied to conceal the fact that the decision had already been made.

II.

NO FACTUAL OR LEGAL ISSUE OF SIGNIFICANCE IS PRESENTED BY THE ALLEGED INCREASE IN INVENTORY OR FAILURE TO DRAW A SALARY IN THAT PETITIONER HAS SIMPLY NOT DISCLOSED THE LACK OF PROFIT IN THE BUSINESS NOR THE DEBIT AND LIABILITY SIDE OF THE LEDGER.

Petitioner argues that the court has failed to consider an increase in inventory at the coin shop which Mr. Godar acquired and operated during the back pay period. Petitioner suggests without explicitly stating that the increase in inventory was hidden profit of some sort. Petitioner also suggests that Mr. Godar should have a salary attributed to him in relation to the business. Petitioner can only frame a viable argument by failing to disclose salient facts pertaining to the issue.

Respondent mortgaged and later sold his home, and sold other property to provide operating expenses and acquire inventory for his coin shop. He also borrowed heavily from other sources.

The coin shop did not operate at a profit and there was no basis for believing that a salary for the respondent would have represented anything other than additional borrowed funds.

Petitioner's argument that there was an increase in inventory ignored an even greater increase in debt.

The Court's approach was consistent with *Carden v. Westinghouse* which indicates that we must look at the reality of what gain has or has not been realized by the respondent. *Carden v. Westinghouse*, 850 F.2d 996, 1006 (3rd Cir. 1988).

Petitioner complains that Eighth Circuit did not even discuss this issue. Respondent respectfully suggests that the contention is so strained as to merit no discussion. Petitioner considered the inventory's value without considering the debt incurred in it's acquisition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — JOINT STIPULATION OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 86-0947-C-5

RICHARD L. GODAR,

Plaintiff,

v.

PETROLITE CORPORATION,

Defendant.

JOINT STIPULATION

1. Plaintiff was employed by Defendant from November 8, 1954 until August 12, 1985.

2. Plaintiff and Tom Wells were terminated from Defendant's Research and Development Group on or about August 12, 1985.

3. The following individuals were terminated by Defendant from its Industrial Chemical Group: S.B. Young, J.M. Tobin, E.E. Quin, D. Torres, A.J. Wieber, G.A. Roeder, E.J. Hautala, M.V. Allen, C.W. St. Amant, D.R. Grimes, R.A. Hayes, W.L. Kearns, R.J. Johnson, E.D. Childers, S.P. Seay, and D.P. Binz. The aforementioned individuals were terminated late July and August, 1985.

Appendix A

4. Plaintiff's rate of pay at the time of his demotion and discharge was $4,225.00 per month.

5. Plaintiff's date of birth is May 26, 1930.

Respectfully submitted,

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